

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

Case No. 2:14-CV-00102-JPH

PEGGY SUE PETERSON, a/k/a  
PEGGY SUE SHAW,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 14, 16. Attorney Dana Chris Madsen represents plaintiff (Peterson). Special Assistant United States Attorney Franco L. Becia represents defendant (Commissioner). The parties consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's motion for summary judgment, ECF No. 16.

**JURISDICTION**

Peterson applied for supplemental security income benefits (SSI) on December 4, 2012, alleging disability beginning at birth on July 1, 1963 (Tr. 175-80). The claim was denied initially and on reconsideration (Tr. 116-19, 124-30).

1 Administrative Law Judge (ALJ) R.J. Payne held a hearing October 24, 2013.  
2 Peterson, represented by counsel, and a medical expert testified (Tr. 38-66). On  
3 November 25, 2013, the ALJ issued an unfavorable decision (Tr. 21-35). The  
4 Appeals Council denied review March 6, 2014, making the ALJ's decision final (Tr.  
5 1-5). On April 18, 2014 Peterson filed this appeal pursuant to 42 U.S.C. §§ 405(g).  
6 ECF No. 1, 4.

### 7 **STATEMENT OF FACTS**

8 The facts have been presented in the administrative hearing transcript, the  
9 ALJ's decision and the parties' briefs. They are only briefly summarized here and  
10 throughout this order as necessary to explain the Court's decision.

11 Peterson was 50 years old at the hearing. She has a ninth grade education and  
12 earned a GED. She has worked as a housekeeper, dishwasher, nursing assistant/care  
13 giver, stocker and prep cook. She can walk two or three blocks, stand seven minutes  
14 and sit ten minutes. (Tr. 44-55, 57, 436).

### 15 **SEQUENTIAL EVALUATION PROCESS**

16 The Social Security Act (the Act) defines disability as the "inability to engage  
17 in any substantial gainful activity by reason of any medically determinable physical  
18 or mental impairment which can be expected to result in death or which has lasted or  
19 can be expected to last for a continuous period of not less than twelve months." 42  
20 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall

1 be determined to be under a disability only if any impairments are of such severity  
2 that a plaintiff is not only unable to do previous work but cannot, considering  
3 plaintiff's age, education and work experiences, engage in any other substantial  
4 work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
5 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and  
6 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

7 The Commissioner has established a five-step sequential evaluation process  
8 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
9 one determines if the person is engaged in substantial gainful activities. If so,  
10 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
11 decision maker proceeds to step two, which determines whether plaintiff has a  
12 medically severe impairment or combination of impairments. 20 C.F.R. §§  
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

14 If plaintiff does not have a severe impairment or combination of impairments,  
15 the disability claim is denied. If the impairment is severe, the evaluation proceeds to  
16 the third step, which compares plaintiff's impairment with a number of listed  
17 impairments acknowledged by the Commissioner to be so severe as to preclude  
18 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20  
19 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
20 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is

1 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth  
2 step, which determines whether the impairment prevents plaintiff from performing  
3 work which was performed in the past. If a plaintiff is able to perform previous work  
4 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
5 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is  
6 considered. If plaintiff cannot perform past relevant work, the fifth and final step in  
7 the process determines whether plaintiff is able to perform other work in the national  
8 economy in view of plaintiff's residual functional capacity, age, education and past  
9 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*  
10 *Yuckert*, 482 U.S. 137 (1987).

11 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
12 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
13 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
14 met once plaintiff establishes that a mental or physical impairment prevents the  
15 performance of previous work. The burden then shifts, at step five, to the  
16 Commissioner to show that (1) plaintiff can perform other substantial gainful  
17 activity and (2) a "significant number of jobs exist in the national economy" which  
18 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

### 19 STANDARD OF REVIEW

20 Congress has provided a limited scope of judicial review of a Commissioner's

1 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision,  
2 made through an ALJ, when the determination is not based on legal error and is  
3 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir.  
4 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's]  
5 determination that a plaintiff is not disabled will be upheld if the findings of fact are  
6 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir.  
7 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,  
8 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9<sup>th</sup> Cir. 1975), but less than a  
9 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989).  
10 Substantial evidence "means such evidence as a reasonable mind might accept as  
11 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401  
12 (1971)(citations omitted). "[S]uch inferences and conclusions as the [Commissioner]  
13 may reasonably draw from the evidence" will also be upheld. *Mark v. Celebreeze*,  
14 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a  
15 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*  
16 *v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,  
17 526 (9<sup>th</sup> Cir. 1980)).

18 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.  
19 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
20 interpretation, the Court may not substitute its judgment for that of the

1 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
2 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
3 set aside if the proper legal standards were not applied in weighing the evidence and  
4 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d  
5 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
6 administrative findings, or if there is conflicting evidence that will support a finding  
7 of either disability or nondisability, the finding of the Commissioner is conclusive.  
8 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

### 9 **ALJ'S FINDINGS**

10 At step one ALJ Payne found Peterson did not work at SGA levels after the  
11 application date of December 4, 2012 (Tr. 23). At steps two and three, he found  
12 Peterson suffers from chronic back pain due to age-related degenerative changes, an  
13 impairment that is severe but does not meet or medically equal a Listed impairment  
14 (Tr. 23, 27). The ALJ found Peterson less than fully credible (Tr. 29). He assessed a  
15 residual functional capacity (RFC) for a range of light work (Tr. 27). At step four,  
16 the ALJ found Peterson is able to perform her past relevant work as a stocker,  
17 housekeeper and prep cook (Tr. 30). Alternatively, at step five, the ALJ used the  
18 Medical-Vocational Guidelines (Grids) as a framework and found Peterson is not  
19 disabled as defined by the Act (Tr. 31).

## ISSUES

Peterson alleges the ALJ erred when he weighed the medical evidence and assessed credibility. She alleges he should have sought the opinion of a vocational expert and should have found she is disabled by applying the Grids. ECF No. 14 at 9. The Commissioner responds that the ALJ's findings are factually supported and free of harmful legal error. She asks the court to affirm. ECF No. 16 at 3.

## DISCUSSION

### *A. Credibility*

Peterson alleges the ALJ's credibility assessment is not properly supported. ECF No. 14 at 14-17. The Commissioner answers that because there is affirmative evidence of malingering, no additional reasons are required, and the ALJ's finding is nonetheless supported by clear and convincing reasons supported by substantial evidence. ECF No. 16 at 5-12.

When presented with conflicting medical opinions, the ALJ must determine credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004)(citation omitted). The ALJ's credibility findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are insufficient: rather the ALJ

1 must identify what testimony is not credible and what evidence undermines the  
2 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918  
3 (9<sup>th</sup> Cir. 1993).

4 The ALJ's reasons are clear and convincing.

5 There is evidence of malingering. In November 2012 Peterson came to the  
6 emergency room alleging she was numb from neck to toe and had lost feeling in her  
7 hands. Findings were very benign. Peterson later admitted she needed a place to  
8 sleep because recently she had been kicked out of a shelter. The ER doctor  
9 diagnosed malingering (Tr. 23, 338-43). The ALJ opines test results in 2008 and  
10 2013 suggested malingering. (Tr. 24-25, 29, 406-12, 434-45.)

11 While tests in 2013 suggest plaintiff exaggerated difficulties (Tr. 439), results  
12 in 2008 show *underreporting* of symptomology (Tr. 407-08)(tests show Peterson is  
13 attempting conceal any symptoms). However, she is also described by the same  
14 examiner as "evasive, vague, obstructive, and resistant to disclosing any real details  
15 about her life." (Tr. 25, citing Tr. 407).

16 The ALJ relied, in part, on the lack of supporting objective evidence and  
17 failure to follow treatment recommendations. See Tr. 23-30, referring to Tr. 379  
18 (good muscle strength throughout both arms; Tr. 381 (good range of motion and no  
19 weakness in both legs); and Tr. 281 (failed to get an MRI ordered by Dr. Shanks).  
20 Plaintiff takes no medication for her physical conditions (Tr. 437). The medical



1 expert testified he did not see evidence of nerve damage in Peterson's hands or feet.  
2 Degenerative changes in the spine were solely a function of age and would not result  
3 in any limitations (Tr. 24, referring to Tr. 40-43). All suggest much greater  
4 functional capacity than alleged.

5 Plaintiff has also made numerous inconsistent statements. She told Dr. Pollack  
6 she had suffered no childhood abuse (Tr. 436). She told Dr. Mabee she suffered  
7 physical abuse by her mother and sexual abuse by her brother during childhood (Tr.  
8 405).

9 Subjective complaints contradicted by medical records may be considered, as  
10 long as it is not the only basis for discrediting a claimant's subjective complaints.  
11 *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9<sup>th</sup> Cir. 2008).  
12 Inadequately or unexplained failure to follow treatment recommendations or  
13 consistently seek treatment is properly considered. *Tommasetti v. Astrue*, 533 F.3d  
14 1035, 1039 (9<sup>th</sup> Cir. 2008); *Burch v. Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005).  
15 The ALJ may consider inconsistent statements when assessing credibility. *Thomas v.*  
16 *Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir. 2002).

17 The ALJ's credibility assessment is supported by the evidence and free of  
18 harmful error.

19 *B. Mental impairments*

20 Peterson alleges the ALJ should have found she suffers severe mental

1 impairments. ECF No. 14 at 12-14. The Commissioner responds that plaintiff failed  
2 to meet her burden and the ALJ properly weighed the evidence of mental  
3 impairment. ECF No. 16 at 15-20.

4 At step two, a claimant must establish that he or she suffers from a medically  
5 determinable impairment. *See Ukolov v. Barnhart*, 420 F.3d 1002, 1004-1005 (9<sup>th</sup>  
6 Cir. 2005). The existence of a medically determinable impairment cannot be  
7 established in the absence of objective medical abnormalities, i.e., medical signs and  
8 laboratory findings. SSR 96-4p.

9 Next, the claimant has the burden of proving that “these impairments or their  
10 symptoms affect [her] ability to perform basic work activities.” *Edlund v.*  
11 *Massanari*, 253 F.3d 1152, 1159-1160 (9<sup>th</sup> Cir. 2001). Denial of a claim at step two  
12 is only appropriate if the medical signs, symptoms and laboratory findings establish  
13 only a slight abnormality that would not be expected to interfere with a person’s  
14 ability to work. This has been described as a “de minimus” screening device  
15 designed to dispose of groundless or frivolous claims. *Yuckert v. Bowen*, 841 F.2d  
16 303 (9<sup>th</sup> Cir. 1988); SSR 85-28.

17 W. Scott Mabee, Ph.D., evaluated Peterson three times. The first evaluation  
18 was April 24, 2008 (Tr. 403-12). He opined psychological problems prevent her  
19 from working (Tr. 408). He evaluated plaintiff again six months later, on October  
20 15, 2008 (Tr. 413-21). He opined “substance abuse could be a possibility” (Tr. 417).

1 Dr. Mabee evaluated plaintiff again after another six months, in April 2009. Plaintiff  
2 was trying to find a job. He opined she “clearly has problems;” however, the  
3 MMPI-2 was again invalid (Tr. 422-33).

4 The ALJ rejected Dr. Mabee’s opinion because Plaintiff’s current application  
5 failed to allege any mental problems. Similarly, the appeals documents failed to  
6 allege any mental problems (Tr. 25). She has never had mental health treatment and  
7 takes no psychotropic medication (Tr. 25). She has greatly exaggerated symptoms  
8 on most of the tests she has been given. These are all specific, legitimate reasons for  
9 rejecting this examining psychologist’s opinion. In addition, plaintiff described her  
10 activities as baking, taking classes, cooking, cleaning, driving, grocery shopping,  
11 going to the library and visiting friends and family (Tr. 424). This level of  
12 functioning is clearly inconsistent with debilitating mental health symptoms.

13 Dr. Pollack evaluated plaintiff more than four years later, on October 22,  
14 2013. Some of the personality test results were invalid. (Tr. 434-45.) He assessed  
15 several marked and moderate limitations (Tr. 442-444).

16 The ALJ rejected this opinion because the assessed cognitive disorder is not  
17 supported by the Plaintiff’s own statements that she had a normal educational  
18 experience. *Cf.* Tr. 441 with *Tr.* 405 (no special education classes; left school in  
19 ninth grade to become a babysitter and later earned a GED). Plaintiff’s long work  
20 history is also inconsistent with a disabling cognitive disorder. *See* Tr. 405 (plaintiff

1 worked for eighteen years as a geriatric health provider).

2 In evidence considered by the Appeals Council but not by the ALJ, Patricia  
3 Norton, MA, LMHC opined in December 2013 plaintiff is unable to work (Tr. 449-  
4 50). The Court considers this evidence part of the record on review. *Brewes v.*  
5 *Comm'r of Soc. Sec.*, 682 F.3d 1157, 1159-60 (9<sup>th</sup> Cir. 2012).

6 Ms. Norton's opinion does not change the outcome. The ALJ appropriately  
7 determined plaintiff does not suffer from a severe mental impairment. The record  
8 strongly supports this conclusion. Plaintiff's past and present activities and  
9 established malingering in particular support the ALJ's finding. The opinion of a  
10 case manager at the homeless shelter where plaintiff sometimes resides does not  
11 change the other evidence supporting the ALJ's determination.

12 Plaintiff did not allege mental limitations initially or on appeal. The  
13 undersigned finds that the claimant has not met the burden of establishing a severe  
14 mental impairment or error by the ALJ in weighing the evidence of mental  
15 limitations.

16 An ALJ may properly reject any opinion that is brief, conclusory and  
17 inadequately supported by clinical findings. *Bayliss v. Barnhart*, 427 F.3d 1211,  
18 1216 (9<sup>th</sup> Cir. 2005). An ALJ may not rely *solely* on a nonexamining expert's  
19 opinion when rejecting the opinion of a treating doctor, as this does not constitute  
20 substantial evidence. *Pitzer v. Sullivan*, 908 F.2d 502, 506 n. 4 (9<sup>th</sup> Cir.

1 1990)(emphasis added). Opinions based on a claimant's unreliable self-report need  
2 not be credited. *Bayliss*, 427 F.3d at 1216.

3 *C. RFC and Grids*

4 Peterson alleges the ALJ erred by finding she has the RFC to perform a range  
5 of light work. She alleges she should have been found capable of sedentary work, as  
6 assessed by Dr. Shanks, and this would mandate a finding of disability pursuant to  
7 Medical-Vocational Rule 201.14 (the "Grids). ECF No. 14 at 14.

8 The flaw in Plaintiff's reasoning is with respect to the RFC. The ALJ found  
9 plaintiff is capable of light rather than sedentary work, and this finding is fully  
10 supported.

11 The ALJ notes Plaintiff testified she thought she could perform light work (Tr.  
12 29, 58 – plaintiff says she can carry 12 to 18 pounds). She also testified on Sundays  
13 she puts together 10 tables, 84 chairs and 12 salt and pepper shakers for church  
14 banquets (Tr. 29, 63). Perhaps most significantly Dr. Shanks expected the limitation  
15 to sedentary work to last no more than two months. (Tr. 26, 376).

16 The ALJ properly found plaintiff is able to perform light work.

17 *D. VE*

18 Peterson alleges the ALJ erred by failing to call a vocational expert to testify.  
19 ECF No. 14 at 11-12.

20 The ALJ found plaintiff has no severe mental limitations and is capable of

1 performing past relevant work. This assessed RFC did not require a vocational  
2 expert's testimony. Step five was an alternative finding, one the ALJ was not  
3 required to make. On this record a vocational expert's testimony was unnecessary.

4 Peterson alleges the ALJ should have weighed the evidence differently, but  
5 the ALJ is responsible for reviewing the evidence and resolving conflicts or  
6 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It  
7 is the role of the trier of fact, not this court, to resolve conflicts in evidence.  
8 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
9 interpretation, the Court may not substitute its judgment for that of the  
10 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
11 1984). If there is substantial evidence to support the administrative findings, or if  
12 there is conflicting evidence that will support a finding of either disability or  
13 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812  
14 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

15 The ALJ's determinations are supported by the record and free of harmful  
16 legal error.

## 17 CONCLUSION

18 After review the Court finds the ALJ's decision is supported by substantial  
19 evidence and free of harmful legal error.

20 **IT IS ORDERED:**

1 Defendant's motion for summary judgment, **ECF No. 16**, is **granted**.

2 Plaintiff's motion for summary judgment, ECF No. 14, is denied.

3 The District Court Executive is directed to file this Order, provide copies to  
4 counsel, enter judgment in favor of defendant and **CLOSE** the file.

5 DATED this 30th day of October, 2015.

6 *S/ James P. Hutton*

7 JAMES P. HUTTON  
8 UNITED STATES MAGISTRATE JUDGE  
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